2003

The Dubious Concept of Jurisdiction

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Source: Hastings Law Journal

Citation: 54 Hastings L.J. 1613 (2003).

Title: *The Dubious Concept of Jurisdiction*

Articles

The Dubious Concept of Jurisdiction

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Introduction

It is well settled that jurisdiction[1] and the merits of a case are separate matters. The Supreme Court has explained it in the following way: Jurisdiction is power.[2] In its absence, the court can do nothing but dismiss the case. Without jurisdiction, the court cannot proceed to judgment on the merits; if it does, the result is *coram non judice*—a nullity.[3] Conversely, if the court possesses jurisdiction, its judgment on the merits will be binding even if the court has reached the wrong result by way of seriously flawed process.[4] This is the conventional wisdom about jurisdiction.

In this essay I will argue that the conventional wisdom about jurisdiction is misleading, and, on occasion, dangerous. It is misleading because it is based on a false premise—that the *true concept* of jurisdiction is distinct from the *true concept* of the merits. According to the conventional wisdom, if a judge is smart enough and searches hard enough, he or she can always distinguish issues that are "jurisdictional" from issues that "go only to the merits," in much the same way that a mathematician can always distinguish rational numbers from irrational numbers. The mathematician may have to string out a number many

* I would like to thank Larry Alexander, Vik Amar, Leo Kanowitz, David Levine, Rick Marcus, and the participants in the Hastings legal theory workshop for their comments and suggestions, and the incomparable Claire Hervey for her research assistance.

1. I mean jurisdiction to include both the "subject matter" and "territorial" ("personal") varieties. I would hasten to point out that I am not the first who has discussed the "myth" of jurisdiction as power. *See* Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

2. *See* note 7, *infra*.

3. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

4. *See* Stump v. Sparkman, 435 U.S. 349 (1978). Relief from a federal court judgment is available under Fed. R. Civ. P. 60(b) if the judgment was arrived at through a violation of the Due Process Clause. *See* text and accompanying notes 24–27, *infra*.

decimal places, but every number eventually works itself out to be either rational or irrational. By the same token, according to conventional belief, every legal issue is either jurisdictional or non-jurisdictional. A legal issue either speaks to the power and competence of the tribunal, making it jurisdictional, or it does not, making it "the merits" (or something ancillary to the principal proceeding, like attorney's fees). I will argue that this belief is false—that there is no hard conceptual difference between jurisdiction and the merits. Put another way, the line between jurisdictional issues and merits issues is always at some level arbitrary. I will further argue that the conventional wisdom is dangerous because it has the potential to make judges think that the issue is whether they *can* exercise their ability to do justice rather than whether they *should* exercise their ability to do justice.[5]

Despite the radical-sounding tenor of my diagnosis, my proposed "solution" is anything but radical. I will argue that judges and lawyers should refrain from making appeals to the "nature" or "concept" of jurisdiction. Whether a particular matter is to be treated as "jurisdictional" or "the merits" should be decided not by resort to metaphysics, but by resort to such familiar policy considerations as notice, reliance interests, finality, judicial efficiency, and the equities.[6] In a hard case, where it is unclear whether the rules denominate a particular issue "jurisdictional," the court should not try to resolve the question by asking whether the issue is "in the nature of" jurisdiction, or whether it "seems" jurisdictional. There simply is no satisfying core concept of jurisdiction to provide the desired model. Instead, the court should look to the effects (notice, reliance, finality, and justice) of treating that particular issue as if it were jurisdictional (capable of being raised for the first time on appeal, analytically prior to other issues in the case, and so on).

The essay takes the following structure. I will begin by explaining why I think that jurisdiction is conceptually indistinct from the merits. I will then briefly survey three doctrinal areas in which the line between

5. My analysis refutes one type of conceptual approach to jurisdiction, and in that sense it falls within the Legal Realist tradition. However, I take no position on whether conceptualism in the law generally makes sense. For a description of the conceptualism associated with Langdellianism, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). For a modern argument in favor of a certain sort of conceptualism, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

6. Some may interpret my approach as "pragmatic" in the sense that I seem to eschew concepts and embrace contextual decisionmaking. For the record, I do not universally reject all legal concepts, and I also think the rule-of-law virtues are sufficiently strong to make brightline rules attractive in many areas. If that makes me a pragmatist, then I plead guilty to pragmatism.

On a similar note, some may infer from my thesis that I believe there are no hard-edged rules, and "all law is really politics." In fact, I doubt that all law is "politics" in any meaningful sense of the word "politics," and I doubt that most judges act like ordinary politicians. *See* Evan Tsen Lee, *The Politics of* Bush v. Gore, 3 J. APP. PRAC. & PROCESS 461 (2001).

I think of my effort here as falling in line with the so-called "ordinary language" approach to legal philosophy pioneered by H.L.A. Hart in his THE CONCEPT OF LAW (1961).

jurisdiction and the merits seems especially weak. I will then speculate that the absence of a conceptual distinction between jurisdiction and the merits contributed to the courts' failure to follow a consistent pattern in labeling issues as jurisdictional and non-jurisdictional. Finally, I will advocate that judges and lawyers abstain from the metaphysics of jurisdiction.

I. Why Jurisdiction Is Not Conceptually Distinct from the Merits

When I say that jurisdiction is conceptually indistinct from the merits, I mean only that there is no "essential" quality of a jurisdictional issue that necessarily makes it different from merits issues. There is no *sine qua non* of jurisdiction that necessarily sets jurisdictional issues off from non-jurisdictional issues. Note that I say "necessarily." Of course there are many jurisdictional issues that are in fact analytically different from merits issues, just as there are many differences among merits issues themselves. My claim is merely that there is nothing unique about jurisdiction ensuring that jurisdictional issues will be analytically distinguishable from merits issues.

Our legal culture insists that there does exist an essential quality making jurisdiction unique—power. As usual, the pithiest aphorism was uttered by Justice Holmes: "[T]he foundation of jurisdiction is physical power."[7] Unlike, for example, the questions of whether the statute of limitations has expired, or whether the plaintiff had stated a good cause of action, the question of jurisdiction asks whether the court has the power to proceed to these other questions.[8] The United States Supreme Court has stated on many occasions that jurisdiction is power, and in its absence, the court's only function is to dismiss the case.[9] The same cannot be said of any other issue in the lawsuit. A court that awards judgment for plaintiff despite the expiration of the statute of limitations has committed reversible error, but it has not operated in the absence of power. The same holds for a court that awards judgment for plaintiff in

7. McDonald v. Mabee, 243 U.S. 90, 91 (1915).

8. *See Steel Co.*, 523 U.S. at 94.

9. The Court said this the first of many times in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 630 (1869). *See also* United States v. Cotton, 535 U.S. 625 (2002), *overruling Ex parte* Bain, 121 U.S. 1 (1887) ("*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, 'the courts' statutory or constitutional *power* to adjudicate the case'") (quoting *Steel Co.*, 523 U.S. at 89); Lindahl v. OPM, 470 U.S. 768, 793 n.30 (1985) (distinguishing venue from jurisdiction, which relates to a "power of the court").

In *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 718 (1838), the Supreme Court refers to jurisdiction as both "power" and "authority" as if there were no difference between the two:

> Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction . . . .

the absence of a viable cause of action. The court has done wrong, but it has produced a binding judgment. By contrast, if a court awards judgment for plaintiff in the absence of jurisdiction, it has produced a nullity.

But what do lawyers mean when we say that "jurisdiction is power"? When we say that a court lacks jurisdiction to proceed, do we mean that it is akin to an unplugged electrical appliance? Or do we mean only that the court would be acting outside the scope of its legitimate authority? In other words, what do we mean by the word "power" in the jurisdictional context? We might seek the answer from a number of different sources—ordinary language, sociology, political science, philosophy. Sociologists define power as "the ability of an individual or group to carry out its wishes or policies, and to control, manipulate, or influence the behavior of others, whether they wish to cooperate or not."[10] Psychologists define power as "the ability to make decisions that have an important impact and that involves others."[11] Ordinary language dictionaries are not in complete agreement. All dictionaries define power as "ability" or "capacity," meaning the ability to achieve a certain result.[12] Some also define power as "authority" or "delegated authority."[13] The difference between these definitions is critical.

The concept of "ability" is purely *descriptive*.[14] If I say that China has the "ability" to overrun Taiwan, I imply no value judgment about whether it would be right or legitimate for China to undertake that action. I am understood to mean only that China has the military might to accomplish that particular objective.[15] By the same token, if I say that

10. A MODERN DICTIONARY OF SOCIOLOGY 307 (George A. & Achilles G. Theodorson eds.) (1969).

11. 3 CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE 1224 (W. Edward Craiggead & Charles B. Namer eds., 3d ed. 2001) (citation omitted).

12. *The Oxford English Dictionary* defines "power" in part as "[a]bility to do or effect something or anything, or to act upon a person or thing." 12 OXFORD ENGLISH DICTIONARY 259 (2d ed. 1989). *The American Heritage Dictionary of the English Language* (4th ed. 2000) defines "power" in part as "the ability or capacity to perform or act effectively." *Webster's Revised Unabridged Dictionary* (1998) defines "power" in part as "ability to act, regarded as latent or inherent; the faculty of doing or performing something; capacity for action or performance; capability of producing an effect, whether physical or moral: potency, might."

13. *The Oxford English Dictionary* alternatively defines "power" as "possession of control or command over others; dominion, rule; government, domination, sway, command; control, influence, authority. b. Authority given or committed; hence, sometimes, liberty or permission to act. c. The limits within which administrative power is exercised; = jurisdiction. . . . Legal ability, capacity, or authority to act; *esp.* delegated authority; authorization, commission, faculty; *spec.* legal authority vested in a person or persons in a particular capacity." 12 OXFORD ENGLISH DICTIONARY 259–60.

14. For the time being I will assume that "ability" is synonymous with "capacity." I concede that in some contexts the word "capacity" might be more closely assimilated to the notion of "authority" than to the notion of "power," but this ultimately makes no difference to my thesis.

15. I suppose some people believe that "might makes right" in the context of relations between sovereign nations, but even those people would confine that dubious proposition to the international context.

a police officer has the "ability" to arrest or otherwise coerce a person, I would not be understood as saying that the officer has the "authority" or the "right" to arrest the person but merely that he could do it if he wanted to. The distinction is as simple as that between "can" and "may." A police officer "can" arrest virtually anyone he chooses to arrest. The combination of weapon and badge enables the officer to physically accomplish an arrest of nearly anyone. Wrongful arrests occur all the time, but surely no one would say that an officer may *legitimately* or *authoritatively* arrest someone for no good reason. In other words, saying that the police officer has the ability to arrest someone implies no judgment about whether it would be right or legal for the officer to engage in that act. It is a purely descriptive, entirely non-judgmental, statement.

Let us now substitute the word "power" for "ability" in the previous paragraph. The substitution makes a huge difference. The statement that an officer has the "power" to arrest an individual is quite different from the statement that the officer has the "ability" to make an arrest. If I were to say that a police officer has the "power" to arrest anyone he wishes for no good reason, the statement is apt to meet with strong opposition, at least among lawyers and judges. In the context of a governmental official exercising coercion against a private citizen, the word "power" connotes legitimate, delegated authority. The statement that a governmental official has the "power" to do something is reasonably taken as a statement of normative acceptance. It implies that we ought to accept the action, whether or not we agree with it as a policy or moral matter.

In what sense do we use the word "jurisdiction" as applied to courts—descriptive or normative? When we say that a court has jurisdiction over the litigants, or over the subject matter, do we mean that the court has the brute physical ability to coerce compliance with its edicts? Or, do we mean to imply that such an exercise of power would be legitimate in some way? The answer is clearly the second, which means that we use the term jurisdiction in the normative sense. The answer is made even clearer by considering a historical example, namely the Supreme Court's decisions in *Brown v. Board of Education* ("*Brown II*")[16] and *Cooper v. Aaron*.[17] In 1957, Governor Orval Faubus of Arkansas refused to obey *Brown II*'s holding to desegregate the public schools with "all deliberate speed." Governor Faubus was in the position of either immediately desegregating Central High School in Little Rock or directly disobeying the Supreme Court and the lower federal courts that had directed the integration to take place in fall 1957. The governor was not inclined to obey. The courts had no effective way of enforcing

16. 349 U.S. 294 (1955).
17. 358 U.S. 1 (1958).

their edicts; all they had was a handful of rather feckless marshals.[18] President Eisenhower reluctantly decided to enforce the courts' rulings by ordering federal troops into Little Rock to "protect" the children.[19] Had the president not taken this action, the edicts probably never would have been obeyed.[20]

If the word "jurisdiction" were purely descriptive, we would have no choice but to say that the federal courts lacked jurisdiction to order the desegregation of Central High, or, equally unsatisfactorily, that the courts only obtained jurisdiction at the moment President Eisenhower ordered in federal troops. We would all quite rightly deny this. The courts had jurisdiction to order desegregation the moment the case came properly before them. Whether the courts could physically manage to induce compliance with their edicts had nothing to do with whether they had jurisdiction over the parties or the subject matter. A political scientist, a historian, or even a contemporary political commentator could accurately say that the courts lacked the "power" to desegregate Central High until the president provided the muscle. But most lawyers would nonetheless say that the courts had the *authority* to desegregate the school. The ability to enforce an order is a matter of power—a descriptive matter. Jurisdiction to enter an order is a matter of authority—a normative matter and one entirely divorced from the question of power.

If jurisdiction were truly power, the contemporary doctrine of personal jurisdiction would be difficult to explain. Despite Holmes's aphorism,[21] it is not at all clear that even ancient practice required the court to possess "physical power" over the defendant. According to Professor Ehrenzweig, "English legal history furnishes little support for the power doctrine. Even when the King's Bench, in competition with the Common Pleas, began to base its personal jurisdiction upon the physical arrest of the defendant, actual physical power over the defendant was not invariably required."[22] Physical power was neither

18. Legal Opinion of Attorney General Herbert Brownell to President Eisenhower on Little Rock School Desegregation, Nov. 7, 1957, *reprinted in* 7 CIVIL RIGHTS, THE WHITE HOUSE, AND THE JUSTICE DEPARTMENT, 1945–1968, at 139, 167 (Michael R. Belknap, ed.).

19. *Reprinted in id.* at 139 (Eisenhower diary entry, Sept. 20, 1957).

20. In Federalist 78, Hamilton wrote that the judiciary "has no influence over either the sword or the purse .... It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 15 (1991) ("For Court orders to be carried out, political elites, electorally accountable, must support them and act to implement them .... [T]he unwillingness of state authorities to follow court orders, and the need to send federal troops to Little Rock, Arkansas, to carry them out, makes the same point. Without elite support (the federal government in this case), the Court's orders would have been frustrated."). Regarding the implementation and enforcement of judicial decisions, see also BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (2d ed. 1999).

21. *See supra* note 7.

22. Ehrenzweig, *supra* note 1, at 297.

sufficient in itself to establish personal jurisdiction in English law, nor was it necessary, Ehrenzweig concluded.[23] Whether or not this historical account is correct, it is certainly an accurate description of personal jurisdiction today. When a deadbeat dad sneaks off to another state or country, the court that entered the support order retains personal jurisdiction over him. It can hardly be said, however, that the court retains physical power over him. The plaintiff can sue on the judgment in the foreign state or country or execute on the defendant's property within the judgment state. But the judgment court cannot physically coerce the defendant without associating the physical power of officials elsewhere. The illustration becomes even more pointed if the deadbeat dad cannot be found. Wherever he may be, the court continues to have personal jurisdiction over him, yet there is no ability whatsoever to coerce compliance.

One reason that the conventional wisdom persists is the existence of doctrines like Federal Rule of Civil Procedure 60(b). The case law clearly states that a federal court has no discretion to deny a motion for relief from a judgment unsupported by either personal or subject matter jurisdiction.[24] This rule seems natural in some way; if jurisdiction is power, then a jurisdiction-less judgment is a non-entity, and the movant must be permitted relief no matter how compelling a case on the merits might underlie the judgment. But further investigation complicates the story. Case law also holds that a court always has "jurisdiction to determine its own jurisdiction."[25] That is, if the question of subject matter jurisdiction was actually litigated before the judgment court and the court determined that it possessed jurisdiction, then that determination is binding on all future courts, even if the determination was erroneous.[26] The judgment court's finding of jurisdiction is binding even if the issue was never contested but could have been.[27] Viewed from the perspective of the conventional wisdom about jurisdiction, this exception poses a serious problem. If jurisdiction is power, does this doctrine not permit a court to create its own power by simply finding—erroneously—that it already possesses the power? Obviously there is no analogue in the physical world for this kind of spontaneous self-

23. *Id.* at 299.

24. *See, e.g.*, Carter v. Fenner, 136 F.3d 1000, 1005 (5th Cir. 1998), *cert. denied*, 525 U.S. 1041 (1998); Chambers v. Armontrout, 16 F.3d 257, 260 (8th Cir. 1994); Jordon v. Gilligan, 500 F.2d 701, 704 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1974) ("A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside."); *see* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2862 n.1 (2d ed. Supp. 2003).

25. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2862, at 331 (2d ed. 1995).

26. *See* Durfee v. Duke, 375 U.S. 106 (1963); Stoll v. Gottlieb, 305 U.S. 165 (1938); 11 WRIGHT ET AL., *supra* note 25, §2862, at 331 & n.13.

27. *See* Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); United States v. Tittjung, 235 F.3d 330 (7th Cir. 2000), *cert. denied*, 533 U.S. 931 (2000); 11 WRIGHT ET AL., *supra* note 25, § 2862, at 331 & n.14.

generation of power. When the Rule 60(b) example is considered in its full complexity, it tends to disprove rather than prove the truth of the conventional wisdom.

So, jurisdiction cannot truly be a matter of power but instead must be a matter of something like legitimate authority. Then, why is not legitimate authority the metaphysical "essence" or *sine qua non* of jurisdiction? The answer is that legitimacy is not unique to jurisdictional matters. The merits all relate to legitimacy as well, which is precisely why courts have so much difficulty distinguishing jurisdictional matters from the merits. This requires some explanation.

Jurisdiction and the merits are both ultimately concerned with the same thing, which is the legitimacy of the resulting judgment. Legitimacy itself is a complicated political and philosophical subject, and it is usually important to distinguish between normative legitimacy and sociological (descriptive) legitimacy.[28] Normative legitimacy is concerned with whether an edict *ought* to be obeyed; sociological legitimacy is concerned with whether people *actually will* obey or at least whether most people will actually think that it ought to be obeyed. In other words, if one asserts that a court order ought to be obeyed, he or she makes a claim that the order is legitimate in a normative sense. If I say that the Supreme Court's order to desegregate Central High School was normatively legitimate, I mean it should have been obeyed, whether or not Governor Faubus was actually inclined to obey without a gun held to his head or whether most people in the United States recognized the order as one that should be obeyed. On the other hand, the only way to determine whether the order had sociological legitimacy is to inquire whether Governor Faubus would have obeyed absent coercion or whether most Americans recognized the order as valid. To put it in lawyerly terms, the question of normative legitimacy is "objective"—concerned only with whether an order should be obeyed. The matter of sociological legitimacy is subjective, which means that it is concerned only with whether people actually think the order should be obeyed.

Normally it is important to separate these two types of legitimacy, but it turns out that it does not matter for my present purposes. Jurisdiction and the merits relate to both types of legitimacy. If a court has jurisdiction, that fact both provides a reason for the litigants to obey any resulting order, and it increases the likelihood that people, including the litigants, will recognize a resulting order as something that ought to be obeyed. By the same token, if a court lacks jurisdiction, this provides a reason for the litigants to ignore any resulting order, and it decreases the likelihood that people will see the order as being worthy of obeisance. So, jurisdiction goes to the legitimacy of a resulting judgment.

But—and here is the problem—the same thing is true of the merits. If the plaintiff states a good cause of action, and if he introduces sufficient evidence to prove that the applicable liability rule has been

28. *See, e.g.*, Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285 (1989).

violated, then those are good reasons why the defendant ought to obey a judgment for the plaintiff. Additionally, if all those things are true, they increase the likelihood that the defendant will obey a judgment for the plaintiff or at least that most people will think that the defendant should obey such a judgment.

It might be argued that these statements would be false if there concededly were no jurisdiction to proceed in the matter. According to this argument, if a judgment for the plaintiff is unsupported by jurisdiction, the fact that the plaintiff had a strong case on the merits is no reason at all to obey the invalid judgment. Nor would the strength of the plaintiff's case on the merits increase the chances that a defendant would obey such a judgment. By this reasoning, a void judgment is a legal zero. No matter how large a merits "multiplier" is applied to it, the product will be zero.

This line of thinking is incorrect. The fact that a neutral and impartial third party—the court—has confirmed the strength of the plaintiff's case on the merits constitutes a reason for the defendant to capitulate. People have honest disagreements all the time, and it is rational to submit such disagreements to impartial arbiters. Once the arbiter decides, the decision constitutes a reason for everyone, including the loser, to consider the disagreement as having been resolved in favor of the winner. It is true that the invalidity of the judgment virtually eliminates any possibility that it will be enforced. But the fact that an impartial tribunal has ruled for the plaintiff creates both moral and pragmatic reasons for the defendant to give in. The moral reason grows out of the fact that an impartial arbiter has decided based on a presumably fair procedure. The pragmatic reason is that most defendants would like others in society to submit to the decisions of impartial arbiters, even if it turns out that their judgments are technically defective.

I do not want to be misunderstood as saying that the strength of the plaintiff's case on the merits necessarily creates a *sufficient* reason for the defendant to capitulate. In the vast majority of cases, the defendant's perception of the strength of the plaintiff's case does not, in itself, constitute a sufficient reason for the defendant to give in. There may exist many countervailing reasons, not the least of which is that the defendant does not wish to surrender whatever property or liberty is at stake. In most of these cases, it will take a valid and therefore enforceable judgment to tip the balance in favor of capitulation, although sometimes the impartial arbiter's *confirmation* of the strength of the plaintiff's case is enough to tip the balance.

My point is simply this: the confirmed strength of the plaintiff's case constitutes some reason for the defendant to give in, just as a valid judgment in favor of the plaintiff constitutes some reason to give in. The fact that a valid (and therefore enforceable) judgment is likely to be a much weightier reason for giving in than the strength of the plaintiff's case is beside the point. This is a matter of degree that varies from case

to case. In a few cases, the confirmed strength of the winning party's case may actually provide a stronger reason for the defendant to act than the existence of a valid judgment. Suppose, for example, it turned out that there existed some technical defect in the Supreme Court's jurisdiction over the so-called Watergate tapes case,[29] such that the Court's judgment against President Nixon was invalid. The strength of the case against him, combined with the *confirmation* of that strength by way of a unanimous ruling, supplied both moral and pragmatic reasons for President Nixon to surrender the tapes. Although the technical invalidity of the judgment probably would have emboldened Nixon to delay compliance, it is doubtful whether he could have simply ignored the ruling on the ground of its unenforceability. The ruling, though technically void, possessed a legitimacy born of strength on the merits and impartial process. Both the nation's ruling elites and its general population undoubtedly would have recognized that legitimacy. Interestingly, a technical defect in jurisdiction almost certainly would have sapped the judgment's legitimacy less than, say, a strong dissent by three or four justices.

Although the Watergate tapes case may be an extreme example, a similar dynamic underlies much more mundane litigation. If a court rules in favor of an employee on a discrimination claim, but subsequently vacates its judgment because of a technical defect in jurisdiction, the ruling still constitutes a powerful pragmatic reason for the employer to do something about the claim. The employer will wish to be seen as a fair and reasonable player by its other employees and by the public, and, though it may not give the plaintiff everything the court would have given him, it will have to do something. The ruling stands as a confirmation by a fair and impartial arbiter that the employer in fact was discriminating illegally. The now-vacated ruling will still have some force of legitimacy.

We have arrived at the nub of the matter. Jurisdiction is ultimately about the legitimacy of any resulting judgment,[30] whether we want to speak of normative legitimacy or sociological legitimacy. The merits are also ultimately about the legitimacy of any resulting judgment. There is nothing about either one that necessarily sets it apart from the other.

What, then, is jurisdiction? It is not, as I have said, "power." Rather, jurisdiction denotes *a presumption in favor of the legitimacy of the prospective judgment.* Whereas the conventional wisdom holds that jurisdiction is the power to be wrong and still bind people, the truth is less absolute. Jurisdiction creates a presumption that the resulting judgment is legitimate and therefore binding, but that presumption can

29. United States v. Nixon, 418 U.S. 683 (1974).

30. I do not mean to say that jurisdiction is exclusively about legitimacy. It undoubtedly also serves an important choice-of-forum function, and to that extent it is functionally distinguishable from the merits. But to whatever degree jurisdiction runs to legitimacy, it is indistinguishable from the merits.

be rebutted under highly unusual circumstances, such as corruption, monstrous abridgments of process, outrageously incorrect results, or some combination.[31] Consider the Supreme Court's recent decision in *Bush v. Gore*.[32] Many legal academics think that the decision was wrong on the merits.[33] But very few advocated outright disobedience. The case appeared to fall within the Supreme Court's jurisdiction as set forth by Section 1257 of the United States Code.[34] This fact created a strong presumption that the Court's decision ought to be, and would be, obeyed. But it is not difficult to imagine circumstances that would have rebutted that presumption. Suppose the day after *Bush v. Gore* it was revealed that the justices in the majority had had a covert telephone conference call with Governor Bush in which the candidate promised to appoint a certain conservative jurist to fill the first vacancy on the Court. Or, suppose it was revealed that those justices had simply accepted a million-dollar-per-justice bribe to rule for Governor Bush. Clearly the fact that the Court had jurisdiction over the subject matter would no longer secure legitimacy for the decision.

It is also important to see that corruption is not the only circumstance that could rebut the presumption in favor of legitimacy. The outrageousness of a decision could, too. Suppose in *Bush v. Gore* the five-justice majority had issued an opinion stating, "We think the platform of the Republican Party better suited to governing the country than the platform of the Democratic Party, and we therefore hold for Bush." Would lawyers and judges have felt a strong tug of obligation to obey this decision? Would it more likely have been obeyed or ignored?

Just as the existence of jurisdiction creates only a presumption in favor of legitimacy, the absence of jurisdiction creates only a presumption *against* legitimacy. That is, a tribunal that lacked jurisdiction could, under extremely unusual circumstances, still render a "judgment" that would be regarded as legitimate. Consider Nuremberg.

31. When we say that a court has jurisdiction over a particular matter, we generally mean that any resulting judgment will probably be worthy of obedience by the parties and respect from the public in general. The fact that a court has jurisdiction constitutes both a *reason* to obey any resulting judgment and a basis for *predicting* that the resulting judgment will be generally obeyed and respected, even if the court lacks sufficient coercive power to enforce its judgment. Thus, when I speak of legitimacy, I mean both "true" legitimacy (as political philosophers might think of it) and "sociological" legitimacy (as sociologists or political scientists might think of it).

32. 531 U.S. 98 (2000).

33. *See, e.g.*, David A. Strauss, Bush v. Gore*: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Laurence H. Tribe, eroG .v hsuB *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001); Lee, *supra* note 6, at 462.

34. Title 28, United States Code Section 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (2000).

It is at best questionable whether the tribunal at Nuremberg had "jurisdiction" to render the judgments that it rendered.[35] But the need for an international tribunal in that situation, the undoubted justness of the results, and the meticulously fair procedures by which they were rendered, has led virtually everyone to regard Nuremberg as legitimate. Closer to home, suppose that some enterprising young historian were to discover that the Supreme Court in *Brown v. Board of Education* ("*Brown I*")[36] never had jurisdiction because of an improperly filed paper. Neither the Court nor the legal community generally would question the soundness of *Brown I* as a precedent; it has become too entrenched. The jurisdictional defect would somehow be rationalized away, and rightly so. In the end, I doubt whether most Americans would view such an historical discovery as anything more than a curio, much as the technical illegality of the United States Constitution under the terms of the Articles of Confederation is hardly considered grounds for disobeying the Constitution.[37]

These examples make it clear that jurisdiction and the merits can run together. They can run together because they ultimately have the same function—to tell us about the legitimacy of the resulting

35. Of course, in a superficial sense, the tribunal at Nuremberg undoubtedly had jurisdiction, for on August 8, 1945, the American, French, British, and Soviet governments signed a charter explicitly bestowing such jurisdiction on the tribunal. But where did these four governments get the power to endow the tribunal with such jurisdiction? At least with respect to atrocities committed against German nationals, there was no support in customary international law for the jurisdiction of an international tribunal. *See* Edward M. Wise, *The Significance of Nuremberg*, *in* WAR CRIMES: THE LEGACY OF NUREMBERG 57 (Belinda Cooper ed., 1999):

> [T]he definition of crimes against humanity contained in the Nuremberg Charter referred to inhumane acts committed against any civilian population, and so included atrocities committed against a state's own nationals as well as those committed against civilians in occupied territory. This was a tremendous innovation. There was absolutely no precedent for outsiders actually imposing criminal responsibility on members of a government who persecuted or exterminated their own nationals.

See also YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 40 (1999):

> The establishment of the Tribunal was undoubtedly a political process, which followed debates and controversies within each victor's nation, and was the result of difficult negotiations between their political and legal representatives. Its creation by a quadripartite agreement, even if later confirmed by 19 other countries, did not conform with the norms of customary international law, i.e. the negotiation and approval of an international treaty in an international conference and ratification by states' signatories, a process that would have taken ten to twenty years .... This was the "original sin" of the Nuremberg Trial, in the opinion of a number of international law specialists. The circumstances of the war, the need for urgent action and the claims for revenge and punishment did not allow for such guarantees and alternatives to be investigated: expediency prevailed.

36. 347 U.S. 483 (1954).

37. The scholarly consensus is that the Constitution was illegal under the terms of the Articles of Confederation. *See, e.g.*, Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017–23 (1984); John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181, 187 (1987); Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (1987). *But cf.* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1048 (1988) (arguing Articles of Confederation merely had status of treaty among thirteen sovereign nations).

judgment.[38] It may be true that jurisdiction tends to tell us about legitimacy as it stems from the "propriety" of a particular court deciding, whereas the merits tend to tell us about legitimacy as it stems from an application of liability rules to the facts. In other words, inquiries about whether "this was the proper tribunal" tend to be labeled as "jurisdictional," while inquiries about whether the tribunal "did the correct (or right) thing" tend to be labeled as "merits." But there is no bright line dividing these inquiries from one another, nor could there be.

This is precisely why courts have so much trouble identifying whether certain questions "go to jurisdiction" or merely "to the merits." Take statutes of limitation for filing administrative complaints. Courts are constantly having to ask whether the plaintiff's failure to satisfy a particular statute of limitation constitutes a "jurisdictional defect."[39] This is because a statute of limitation in part determines whether a tribunal is the "proper" body to be resolving a particular dispute, and at the same time it partly determines whether it would be "unjust" to give judgment for the plaintiff because of the plaintiff's own dilatory behavior. The same could be said of causes of action.[40] Black-letter law states that the presence or absence of a cause of action is not to be confused with the presence or absence of jurisdiction.[41] Yet, the question of whether a plaintiff in federal court has a "cause of action" is constantly being run into the question of whether the plaintiff has "standing"—a jurisdictional element.[42] This is not only because of the peculiar structure of standing but because of the indistinct structure of jurisdiction. Jurisdiction and the merits both ultimately speak to the resulting legitimacy of judgments, which is why all attempts to divide them are artificial. Any efficient legal system must and will draw these artificial lines, and the lines will suffice for practical purposes in the vast majority of cases. But the lines are necessarily artificial. This means that one's failure to distinguish between jurisdiction and the merits is not necessarily the result of fuzzy thinking; indeed, it means that one's certitude about the difference between jurisdiction and the merits is sometimes the product of insufficiently rigorous thinking.

One response to my argument would be to concede that jurisdiction and the merits both relate to legitimacy but that they do it in conceptually different ways. According to this response, jurisdiction establishes legitimacy *vel non* by examining the *pedigree* of the judgment, whereas the merits establish legitimacy by examining the *content* of the judgment. The dichotomy between pedigree and content is a familiar one in legal philosophy, having been relied upon by H.L.A. Hart to

38. *But see* note 26, *supra*.

39. *See, e.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

40. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

41. *Id.*

42. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

distinguish legal positivism from natural law.[43] Hart explained that a legal positivist believes the validity of law can be established only by examining its pedigree[44]—who enacted it and in what manner—while a natural lawyer believes that the validity of a law can be destroyed by the gross iniquity of its content. I have no reason to question the soundness of the distinction between pedigree and content in the positivism versus natural law debate, but unfortunately it does not work to distinguish jurisdiction from the merits.

In fact, both jurisdiction and the merits are constantly concerned with the pedigree of a judgment. Jurisdiction is concerned with pedigree in obvious ways. Can we trace the judgment back to some event or set of facts that establishes the court's competence over the parties and the subject matter? It is not ordinarily sufficient that the tribunal's judgment is fair or moral; it must have sprung from some positive law that anoints the tribunal as a proper one to decide such a case.[45] Immediately, however, we can see that much of the merits is also concerned with the pedigree of the judgment. When a court holds that a statute or precedent creates a cause of action, for example, it concerns itself with pedigree. The question (initially, at least) is not whether a cause of action for the plaintiff would be fair or moral, but whether the statute or precedent in question truly creates such a cause of action. The statute or precedent is positive law from whence the cause of action must originate. Eventually the court may ask whether recognizing a cause of action for plaintiff in the circumstances of this case would be fair or right, which would constitute an examination of content rather than pedigree. But in the first instance, the court will have to ask whether the positive law creates such a cause of action—an examination of pedigree rather than content. Thus, jurisdiction and the merits cannot be distinguished on the basis of pedigree versus content.

There is an obvious objection I must address. How can I say that there is no conceptual difference between jurisdiction and the merits when the respective analyses are often so different? To take two examples from federal practice, there is obviously a difference between asking whether all plaintiffs are diverse from all defendants[46] and asking whether the defendant was negligent.[47] The first of these questions relates to subject matter jurisdiction and is totally irrelevant to the merits. More specifically, it has nothing to do with the equities of the situation. The second of these questions relates to the merits and is totally irrelevant to the presence or absence of diversity jurisdiction. It

43. The term "pedigree" actually comes from Dworkin's characterization of Hart's positivism, in particular Hart's "rule of recognition" as the ultimate test of a law's existence. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977).

44. H.L.A. HART, THE CONCEPT OF LAW 97–107 (1961) (introducing the idea of a "rule of recognition").

45. The exception would be an unusual situation like Nuremberg.

46. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

47. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

directly relates to the equities of the situation. The first question would never be confused for the merits and the second would never be confused for a matter of jurisdiction.[48]

This objection misconceives my thesis. My thesis is not that "there is no difference between questions of jurisdiction and questions on the merits." My thesis is that there is no *necessary* difference between questions of jurisdiction and questions on the merits. There is no factor that categorically distinguishes jurisdiction questions from merits questions, just as there is no factor that categorically distinguishes "driving slowly" from "driving fast." No one would dispute that five miles per hour is "driving slowly" or that 200 miles per hour is "driving fast," but in between there are an infinite number of points where context will dictate whether the driving is best characterized as fast or slow.

What about the observation that looking at the citizenship of the parties is unrelated to the equities, while looking at the defendant's alleged negligence is inextricably bound up with the equities? Does not this prove that jurisdiction is different from the merits? Again, the point is that jurisdictional questions are not necessarily different from merits questions. There is nothing to prevent a legislature or court from tying a jurisdictional inquiry to the equities, just as there is nothing to prevent a legislature or court from divorcing the liability rule from the equities. For example, the federal courts do not have jurisdiction over all federal questions but only over "substantial" federal questions.[49] The court does not have jurisdiction if the federal claim is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy."[50] Obviously this jurisdictional inquiry is tied in some way to the equities. On the other hand, there are plenty of tort cases governed by the doctrine of strict liability, which is quite unrelated to the equities (of the particular case, at least). There just is not any essential characteristic of jurisdictional questions that makes them mutually exclusive to merits questions.

48. This objection could be stated in a different way, namely, that jurisdictional questions ask only "should the court proceed?" whereas merits questions ask "who should win?" But jurisdictional questions are not necessarily party-neutral. Again, the rule requiring a "substantial federal question" does more than ask whether the court should proceed. It necessarily asks whether the defendant should win because of the insubstantiality of the plaintiff's claim. Worse yet, all rulings to the effect that the court lacks subject matter jurisdiction respond not only to the question of "should the court proceed?" but also the question of "who should win?" Although it is true that a dismissal for lack of subject matter jurisdiction is not "on the merits" and therefore carries no preclusive effect, it is not "party neutral" in any important respect.

49. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 116 (7th ed. 1993) ("It is essential to the jurisdiction of the Supreme Court under § 1257 that a substantial federal question has been properly raised in the state court proceedings."). The Court has read the element of substantiality into the federal question that must be raised in satisfaction of this jurisdictional requirement. *See* Zucht v. King, 260 U.S. 174, 177 (1922).

50. Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666 (1974).

II. Where Do We Go from Here?

This essay has attempted to prove two things: (1) that jurisdiction is not "power"; and (2) that there is no necessary distinction between jurisdiction and the merits. What flows from these propositions? As a preliminary matter, banishing the term "jurisdiction" from our legal lexicon is out of the question. Centuries of Anglo-American jurisprudence are built on the notion that something called "jurisdiction" is a predicate for moving forward in adjudication. Equally importantly, eliminating the doctrines of jurisdiction would be extremely disruptive to, and inefficient for, the administration of justice. If all doctrines of jurisdiction were abolished, each court confronting a politically or socially controversial claim would have to engage in a full-blown political and sociological analysis of whether a judgment would be legitimate. Worse yet, every litigant and member of the public would be forced to undertake such an analysis as well. The relative consensus underlying the legal order would be undermined. The institution of jurisdiction serves a vital function—to act as a presumption in favor of the legitimacy of a resulting judgment.

Some may argue that federal courts already labor under this obligation to investigate the prospects of legitimacy on a case-by-case basis. The justiciability and abstention doctrines arguably perform this function of making sure that federal court judgments will be considered legitimate.[51] Of special interest are the political question doctrine, which prevents the federal courts from becoming entwined in some questions likely to produce politically divisive judgments,[52] and the Supreme Court's certiorari jurisdiction, which gives the Court an opportunity to avoid any and all such cases.[53] The point is well taken; much of the course called "Federal Courts" is composed of doctrines whose overt or covert object is to husband the courts' political capital. But even these doctrines don't come anywhere close to the sort of ad hoc, start-from-scratch political calculus that courts would have to undertake if it were not for the institution of subject matter jurisdiction. If the court fairly appears to have "jurisdiction" over the subject matter, it can be confident that any good faith judgment will be regarded as legitimate. It may not be popular, and the losing party may denounce the decision in the harshest terms, but the general public and the bar are likely to view it as deserving of respect, and therefore it will probably be obeyed.

It is also extremely important to remember that the presence of jurisdiction is not merely a harbinger of legitimacy. It also constitutes a

51. *See, e.g.*, Allen v. Wright, 468 U.S. 737 (1984); Texas R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

52. *See* Baker v. Carr, 369 U.S. 186 (1962); Nixon v. United States, 506 U.S. 224 (1993).

53. Indeed, the Court recently has moved away from deciding constitutional cases in favor of resolving circuit conflicts over matters of statutory interpretation.

reason to accept the judgment. When Congress "vests" a court with jurisdiction over a particular class of cases, our most important popularly elected institution in effect states, "this court is a proper forum for resolving this type of matter." This ought to put a large thumb on the scales in favor of respecting the ensuing judgment. Without the institution of jurisdiction, no judgment would have that provisional endorsement of legitimacy.

But if there is no true conceptual difference between jurisdiction and the merits, then how can we continue to use the term jurisdiction? The answer is that we should recognize jurisdiction as a creation of positive law, just as the notion of interpleader or exhaustion of remedies are creations of positive law. To put it crudely, if the legislature says there is such a thing as jurisdiction, then judges and lawyers are to act as if there is such a thing as jurisdiction. If the legislature says that questions of subject matter jurisdiction must be resolved before any other issue in the litigation, then judges and lawyers should comply as a simple matter of legislative supremacy. But if the legislature takes no position on the order in which issues must be resolved, courts should not insist upon reaching subject matter jurisdiction first on the ground that "the nature of the judicial power" requires it.

This was the issue before the Court in *Steel Co. v. Citizens for a Better Environment*.[54] Citizens for a Better Environment ("CBE") brought a private enforcement action under the citizen-suit provision of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"). The case posed the question of whether EPCRA authorized suits for purely past violations. (The Sixth and Seventh Circuits were split on the issue.) But once before the Supreme Court, the defendant challenged CBE's standing to sue. Could the Court rule that EPCRA does not authorize suits for wholly past violations without first deciding whether the plaintiff had standing? Or was the Court required to rule on the jurisdictional question first?

The justices divided into three factions. Justices Stevens, Souter, and Ginsburg sought to portray the EPCRA question as itself jurisdictional: "whether [EPCRA] confers federal jurisdiction over citizen suits for wholly past violations[.]"[55] Moreover, the standing issue presented a difficult question of constitutional law. "Because it is always prudent to avoid passing unnecessarily on an undecided constitutional question . . . the Court should answer the statutory question first," wrote Justice Stevens.[56] Justice Scalia, writing for the Court, rejected Justice Stevens' reasoning. Whether EPCRA authorizes citizen suits for purely past violations is a question about actionability, not jurisdiction. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction,

54. 523 U.S. 83 (1998).

55. *Id.* at 112 (Stevens, J., concurring in judgment).

56. *Id.* (citing Ashwander v. TVA, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring)).

i.e., the courts' statutory or constitutional *power* to adjudicate the case," Justice Scalia stated.[57]

Next, Justice Scalia rejected the approach taken by several federal circuits (and endorsed by Justice Stevens), which was "to proceed immediately to the merits question, despite jurisdictional objections, [when] (1) the merits question was more readily resolved, and (2) the prevailing party on the merits would have been the same as the prevailing party if jurisdiction were denied."[58] The Ninth Circuit had referred to this approach as "the doctrine of hypothetical jurisdiction."[59] Justice Scalia made it clear that any such doctrine was unacceptable. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception,'" he wrote.[60] "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."[61]

Justices O'Connor and Kennedy agreed with the Court that, in this particular situation, the jurisdictional question should be reached first. But they did not endorse the absoluteness of the majority's "jurisdiction first" rule. Writing for himself, Justice Breyer elaborated on this position. "[F]ederal courts often, and typically should, decide standing questions at the outset of a case," he acknowledged. "But . . . the Constitution, in my view, does not . . . impose a rigid judicial 'order of operations,' when doing so would cause serious practical problems."[62] An absolute "jurisdiction first" rule "increases, to at least a small degree, the risk of the 'justice delayed' that means 'justice denied,'" he concluded.[63]

Note that six of the nine justices endorse a position directly contradicting the physical power view of jurisdiction. If "jurisdiction equals power," then how can a court decide a merits issue in the absence of jurisdiction, no matter how urgently such a decision is needed? Even Justice Scalia, despite his use of the conceptualist rhetoric ("power," "ultra vires"), cannot possibly believe that jurisdiction equals physical power. He obviously favors an absolute rule because of his well-known absolutist stance on separation of powers.[64] I take no position on whether the "jurisdiction first" rule ought to be referred to as "absolute"

57. *Id.* at 89.

58. *Id.* at 93–94, *citing* SEC v. American Capital Investments, Inc., 98 F.3d 1133, 1139–42 (9th Cir. 1996); Smith v. Avino, 91 F.3d 105, 108 (11th Cir. 1996); Clow v. Dept. of Housing & Urban Dev., 948 F.2d 614, 616 n.2 (9th Cir. 1991); Cross-Sound Ferry Services, Inc. v. ICC, 934 F.2d 327, 333 (D.C. Cir. 1991); United States v. Parcel of Land, 928 F.2d 1, 4 (1st Cir. 1991); Browning-Ferris Indus. v. Muszynski, 899 F.2d 151, 154–59 (2d Cir. 1990).

59. United States v. Troescher, 99 F.3d 933, 934 n.1 (9th Cir. 1996).

60. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (citation omitted).

61. *Id.* at 101–02.

62. *Id.* at 111 (Breyer, J., concurring in part and concurring in judgment).

63. *Id.* at 112.

64. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

or as "presumptive." If the goal is to have jurisdiction-less lower federal courts reach the merits only in truly extraordinary cases, then perhaps the rule should be called "absolute," even if in practice it will not quite live up to the word. My point is simply that, when faced with the truly extraordinary case, the lower federal court judge knows that he or she *can* rule on the merits in the absence of jurisdiction. It is never a question of whether the court *can* rule on the merits, but whether the court *should* rule on the merits. In deciding whether it should rule on the merits, the court must, of course, seriously consider whether it is supposed to rule on the merits, as indicated by the law of jurisdiction. But the judge must not be conditioned in Pavlovian fashion to throw up his or her hands and say, "I am powerless."

So, judges, lawyers, and law professors should stop making appeals to the "essential concept of jurisdiction" or "the nature of jurisdiction." We should also stop saying that jurisdiction equals power. Instead, we should say that jurisdiction equals authority. Subtle as this change in lexicon may seem, it is important to prevent backsliding into conceptualist thinking. When the balance of reasons clearly tips in favor of upholding a judgment or order, a court should not feel compelled to overturn the judgment simply because of a lack of jurisdiction. Suppose in 1975 the state of Texas moved to vacate the judgment in *Roe v. Wade*[65] on the ground that, at the time the Supreme Court rendered its decision, Norma McCorvey had failed to disclose that she had had a hysterectomy following delivery of the child?[66] Unquestionably, the case would have been moot and incapable of repetition as to McCorvey.[67] Should the Court have vacated its two-year-old judgment and waited for a fertile plaintiff to provide an opportunity for reiterating the original decision? Concededly, the absence of jurisdiction would be a strong reason to vacate the judgment, but that reason would certainly be outweighed by the need to protect reliance interests and by the need for social stability. If law students grow up into judges who think jurisdiction equals power and, therefore, that any judgment unsupported by jurisdiction is a nullity, then one of two things happens in this hypothetical: either the Court vacates the judgment, with extremely troubling consequences; or the Court mangles the law of jurisdiction so it can find that jurisdiction in fact existed in this case. It is better to have judges and lawyers who know

65. 410 U.S. 113 (1973).

66. Of course, this is a hypothetical.

67. The Court's justification for reaching the merits was that pregnancy could occur again in the future. One might interpret the Court as alluding to the possibility of future pregnancies in the class of women situated similarly to McCorvey, but the Court's opinion makes no mention of a class ever having been certified, as was critical to the decision in *Sosna v. Iowa*, 419 U.S. 393 (1975). Without a certified class, the "capable of repetition, yet evading review" doctrine operates only when the controversy can recur with respect to the plaintiff herself, see *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) ("DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned").

that the importance of jurisdiction stems from rationality and positive law, not from metaphysics.

There is another benefit to be reaped from a realization that both jurisdiction and the merits ultimately speak to the legitimacy of a resulting judgment. It may advance our thinking about the circumstances under which one may disobey a valid court order. Some people sincerely urge that no one may ever willingly disobey such an order. These people would further argue that one is always deserving of criticism for disobeying a valid court order, no matter how unjust its terms. Others would say that the permissibility of disobedience depends on the circumstances of each case. My thesis about jurisdiction and legitimacy suggests that the latter group has the better argument. If considerations of jurisdiction and the merits both contribute to the quality of a judgment's legitimacy—and nothing else—then it would be nonsensical to consider only the order's validity when trying to decide whether to obey. One should take into account the entire balance of reasons for obeying, including the merits. Of course, that also includes taking into account the fact that an impartial arbiter has taken a different view of the merits. Further, it means taking into account the positive consequences of rule-following, which encourages peaceful dispute resolution and countermands a psychological tendency of losers to see more merit in their arguments than there really is. But my thesis rules out the argument that one ought always to obey valid judgments because there is some sort of *a priori* reason to obey judgments supported by jurisdiction. Jurisdiction, as I have said, should be regarded as a presumption in favor of legitimacy. That presumption might be rebutted by an especially strong case on the merits, defective process, a blatantly impartial tribunal, or, most likely, a combination of such factors. Whether to obey a valid court order, or whether to criticize one who has disobeyed such an order, depends on consideration of all these factors.

III. Does the Anti-Conceptualist View Help Explain Doctrinal Anomalies?

In the previous section I argued that the anti-conceptualist thesis guards against the dangers of thinking that "jurisdiction equals power." It may also help to explain doctrinal confusions or anomalies. One high-profile example would be the Eleventh Amendment. The Supreme Court has held that a state may assert its Eleventh Amendment immunity for the first time on appeal,[68] which suggests that the applicability of state sovereign immunity in federal court creates a defect in subject matter jurisdiction. On the other hand, the Court has held that

68. *See* Edelman v. Jordan, 415 U.S. 651 (1974). Justice Rehnquist's actual language demonstrates the Court's ambivalence about the jurisdictional status of the Eleventh Amendment: "[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Id.* at 678.

a state may explicitly waive its Eleventh Amendment immunity,[69] which suggests that the Eleventh Amendment is not jurisdictional, given the often-reiterated maxim that federal subject matter jurisdiction cannot be created by consent of the parties.[70] Along the same lines, the Court has held that federal appellate courts may, but are not required to, raise an Eleventh Amendment issue *sua sponte*.[71] So the Court has been conflicted about whether the Eleventh Amendment is jurisdictional.

From the standpoint of conventional wisdom about jurisdiction, this ambivalence seems odd. Either the Eleventh Amendment speaks to the power of federal courts or it does not. What basis is there for equivocation? The text of the amendment certainly suggests that it is about power: "The Judicial *power* of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." If it were not sufficiently clear from this language that the amendment speaks to jurisdiction, consider that the phrase "the Judicial power of the United States" was borrowed from Article III, which obviously speaks to federal subject matter jurisdiction.

The problem, of course, is that the Court has linked the Eleventh Amendment to the concept of sovereign immunity, which holds that a sovereign may not be sued without its consent.[72] Given that sovereign immunity is defined in terms of consent, the Court is stuck with the notion that a federal court can entertain a suit against a state if the state consents. Yet all agree that consent of the parties cannot create subject matter jurisdiction. Thus, so long as the Eleventh Amendment is linked to sovereign immunity, it can never be unproblematically regarded as a true matter of subject matter jurisdiction.

Although it could never be proven, the lack of a conceptual difference between jurisdiction and the merits may have contributed to this messy state of affairs. Despite the Court's official position that "jurisdiction equals power," the justices may have consciously or unconsciously realized that the judicial use of the word "power" denotes "authority" rather than physical power. Most people who have been around federal courts for a while have seen a situation where a court, strictly speaking, acted in the absence of subject matter jurisdiction. This

69. *See* Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) (arguing that the state may waive Eleventh Amendment immunity but must do so expressly). More recently, the Court has held that a state waives its Eleventh Amendment immunity by removing a case to federal court. *See* Lapides v. Board of Regents, 535 U.S. 613 (2002).

70. "Of the many debatable features of the Court's Eleventh Amendment jurisprudence, perhaps none can match the curious notion that suits against the states, though nominally placed beyond the 'judicial power' of the federal courts, may nonetheless be brought back within that power by the state's consent to suit." James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1373 (1998).

71. *See* Patsy v. Board of Regents of Fla., 457 U.S. 496, 515 n.19 (1982); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267 (1997).

72. *See* Hans v. La., 134 U.S. 1 (1890).

may have happened because an incompetent plaintiff's lawyer failed to move for remand of a non-removable case, or because a case became moot late in the pendency of an action where both sides wanted a ruling, or because the plaintiff never had standing in the first place and no defendant ever challenged it. It cannot escape the observer's notice that the judgments in these cases look the same as the judgments in cases where jurisdiction existed. The judge still signs a paper called an "order," it still gets filed in the clerk's office, the winner can still execute on the "judgment," and (by and large) the loser still obeys. I am aware that these "judgments" are, in legal contemplation, void. Yet, in the real world these technically void judgments often get just as much work done as valid judgments. Their real world effects are often indistinguishable from the real world effects of valid judgments. The observer can clearly see that the courts issuing these void judgments are hardly "powerless" in a descriptive sense; they may be acting beyond their legitimate authority, but they most certainly are exercising a coercive power of sorts.

If we treat the word "power" as meaning physical power—and I believe many lawyers, judges, and law professors do—then we will have trouble with rules like those surrounding the Eleventh Amendment. If the Eleventh Amendment strips the federal courts of "power" in a certain class of cases, then federal courts *must* raise Eleventh Amendment issues *sua sponte*, and the parties' consent to go forward must be irrelevant. And, if the Eleventh Amendment deprives Congress of the power to vest federal courts with subject matter jurisdiction in a certain class of cases, then it makes no sense to say that Congress may ever "abrogate" Eleventh Amendment immunity, whether pursuant to Article I or the Fourteenth Amendment. If one takes the word "power" in its physical sense, it does not matter how many good reasons there may be to permit such actions to go forward, just as a car without gas cannot be driven no matter how good a reason there is to go somewhere. Simply put, the physical view of power leaves no room for judges to debate what consequences shall flow from a defect of jurisdiction. Under this view, the Supreme Court's Eleventh Amendment jurisprudence *must* be wrong.

But if we view the word "power" as meaning authority, the matter takes on a different complexion. We know that a court can issue efficacious judgments without authority. The judgments may be void and, therefore, not legally binding, but those are normative matters. The judgments can do work nonetheless. We can cure defects of authority by resorting to something like the contract and agency law doctrines of "apparent" authority, subsequent ratification, or equitable estoppel. These fixes are available so long as we understand authority to be a question ultimately addressed to legitimacy and so long as we recognize that authority is not an absolutely essential ingredient of legitimacy.

This is one way to make sense of the jurisdictional tangle surrounding the Eleventh Amendment.[73] Indeed, the Supreme Court may have consciously or unconsciously thought this already. Perhaps when the Court says "jurisdiction equals power," it does so with a wink. The wink signifies that we all know "judicial power" is merely a metaphor for something like authority. Perhaps the Court persists in using the word "power" because it appears in the Constitution, the usage is traditional, and it deters courts from acting in the absence of jurisdiction better than the word "authority" does. In any event, we must acknowledge the possibility that the thesis of this essay is very old news to the members of the Court.

A second area where the thesis may do some explanatory work is the historical development of federal habeas corpus. According to the late Professor Paul Bator, federal habeas relief was unavailable to any petitioner who had been convicted by a court of competent jurisdiction, both subject matter and personal.[74] In other words, one could only obtain habeas relief on the ground that the sentencing court lacked jurisdiction. In *Ex parte Watkins*, the Court on habeas review refused to reach the merits of the petition, stating: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."[75] But before long the Supreme Court began to stretch the idea of when the sentencing court lacked "jurisdiction." In *Ex parte Lange*, the Court held that habeas could be used to review the petitioner's claim that he had been given two sentences when the statute authorized only one.[76] Serious as this alleged error may have been, it is surely a stretch to say that it deprived the sentencing court of subject matter jurisdiction. In *Ex parte Siebold*, the Supreme Court entertained a petitioner's claim that the statute under which he was convicted was unconstitutional. The Court explained that

73. By no means is it the only way. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002). Professor Nelson has recently argued that the Court's problem with Eleventh Amendment jurisprudence has been to confuse two different kinds of sovereign immunity. According to Nelson, the Eleventh Amendment creates a "subject matter jurisdiction" type of sovereign immunity that cannot be abrogated by Congress. The Court has failed to distinguish this from a "personal jurisdiction" sort of sovereign immunity, of the type that James Madison and John Marshall discussed at the Virginia Ratifying Convention. Congress may abrogate this "personal jurisdiction" type of sovereign immunity. *Id.* at 1625. I need take no position on whether Professor Nelson's explanation is correct. Even if he is right that the Supreme Court *should* appreciate the difference between personal and subject matter jurisdiction, to date it has not, which means the members of the Court must have believed that they were fudging on the traditional concept of subject matter jurisdiction by permitting eleventh Amendment waiver and abrogation. And yet, one cannot "fudge" the absence of physical power. Thus, despite what they have said in other cases, the justices must at some level believe that subject matter jurisdiction is not really analogous to physical power.

74. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

75. 28 U.S. (3 Pet.) 193, 202 (1830).

76. 85 U.S. (18 Wall.) 163, 178 (1873).

"an unconstitutional law is void, and is as no law." "A conviction under it is not merely erroneous," the Court continued, "but is illegal and void.... [I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes."[77] Again, this elongates the notion of what constitutes subject matter jurisdiction. As Professor Bator himself put it, "Once the concept of 'jurisdiction' is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner, it becomes a less than luminous beacon."[78] The immediate point is not whether these cases were well or poorly decided, but that—if Bator's history is correct[79]—even nineteenth-century Supreme Court justices occasionally realized that the idea of subject matter jurisdiction was somewhat elastic, unlike the metaphor of physical power.

Still another area in which the Court may have already thought about this is the "capable of repetition, yet evading review" doctrine. In his *Honig v. Doe* concurrence, Chief Justice Rehnquist argued that the Supreme Court should reach the merits of any case in which it has already heard oral argument, even if it is technically moot.[80] This argument flies in the face of Supreme Court doctrine, which holds that a federal court lacks subject matter jurisdiction over a moot case because there exists no "case or controversy."[81] Chief Justice Rehnquist anticipated the objection that the Supreme Court was powerless to hear a matter outside of its subject matter jurisdiction. He pointed to the "capable of repetition, yet evading review" doctrine.[82] If a federal court lacks the power to hear a moot case, he asked, how can such a court decide to hear it nonetheless? Granted that the legal profession and general public may badly need an authoritative settlement of the issue at hand, there is a strong policy reason in favor of hearing the matter. But if mootness truly divests a court of power to proceed, all the policy reasons in the world for reaching the merits would not seem to matter.

77. 100 U.S. 371, 376–77 (1879).

78. Bator, *supra* note 74, at 470.

79. Bator's analysis has been criticized in James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2044–46 (1992). Professor Liebman's reading of the cases convinced him that the Court hewed not to a line between jurisdictional and non-jurisdictional claims, but between "more and less fundamental *types* of claims, be they jurisdictional or not." *Id.* at 2054 (italics in original). If Liebman is right, then it changes the relationship between this line of habeas cases and my thesis about jurisdiction. But Liebman's argument suggests a different relationship between these cases and my thesis: that jurists of this era may have at least sometimes used the term "jurisdictional" as a sort of synonym for "juristically fundamental." This dovetails with my argument that jurisdiction is better analogized to legitimate authority than to physical power. A defect in the sentencing court's proceedings that is sufficiently fundamental to be called "jurisdictional" is also one sufficiently fundamental to affect the legitimacy of the judgment, and vice versa. Put differently, perhaps in Liebman's historical scenario these nineteenth-century jurists were really linking the availability of habeas review with the *illegitimacy* of the underlying judgment, which was then expressed in jurisdictional terms.

80. 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring).

81. *See* Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964).

82. 484 U.S. at 330–31.

Chief Justice Rehnquist concluded that the Supreme Court should consider itself empowered to hear cases that become moot after the Court has heard oral argument.[83]

Although it is not entirely clear, the Chief Justice may have already thought what I am arguing here. True, Article III speaks of "judicial Power." But the best interpretation of "power" in Article III may be something like "authority." If the notion of authority ultimately speaks to the legitimacy of resulting judgments, then strong policy reasons in favor of reaching the merits of a case may go a long way toward justifying a judgment. This is particularly true if the case also contains the values underlying the "case or controversy" requirement, such as full factual development and sharp adversary interests. It is also worth noting that all moot cases were at one time live "cases or controversies," which gives a court an additional, if partial, claim to color of jurisdiction.

I suppose my thesis can be wiped out by a certain type of "original intent" argument. The major premise of this argument would be that ambiguous terms in the Constitution can be interpreted only by recourse to the "original intention" of the framers and ratifiers of the Constitution or perhaps by reference to the understanding of average speakers of English circa 1789. The minor premise of the argument would be that the framers, ratifiers, and average English speakers of the day all understood "judicial Power" to mean something akin to physical power and not to what I have described as "authority." If both these premises are true, then my insight is ruled out by positive law. It would be as if the Framers had intended that we operate on the premise that the world is flat; they could not in fact make the world flat, but they could (according to the "original intent" argument) bind us to a course of action that assumes the flatness of the world. I shall leave the "original intent" argument off to one side.

There remains the issue of whether the courts ought to persist in their conceptualism about jurisdiction for policy reasons. I have defined this conventional wisdom as holding that (a) jurisdiction equals power and (b) jurisdiction can always be separated from the merits in a non-arbitrary manner. I have tried to show why these propositions are false. Assuming that they are false, should the courts nonetheless stand by those propositions on the ground that they are necessary to keep rogue judges in line? Once the courts acknowledge that jurisdiction is not absolutely necessary to the legitimacy of a judgment, it could be argued, power-hungry judges will reach out to decide all sorts of cases in which they hold a strong view of the merits but lack jurisdiction. They will claim that the legal and perhaps even moral righteousness of their ruling on the merits justifies the judgment despite the absence of jurisdiction.

83. *Id.* at 331–32. I have argued elsewhere that mootness should not be understood as a constitutional or jurisdictional problem to begin with. *See* Evan T. Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605 (1992).

I agree that any such situation would be intolerable. It is also extremely unlikely. There may be an adjustment period during which judges underestimate the importance of having jurisdiction before ruling, but eventually they would realize that the bar and general public will only accept a judgment in the absence of jurisdiction when the circumstances are truly extraordinary. Suppose an appellate judge were to stop the imminent execution of an unquestionably innocent defendant despite the fact that the defendant missed the deadline for appeals. This is the sort of truly extraordinary circumstance in which society would accord the judge's order legitimacy even though it would be unsupported by jurisdiction. I cannot imagine anyone who would criticize the appellate judge's behavior in this situation. But if the defendant's innocence were a fifty-fifty proposition rather than a virtual certainty, many would think the order unjustified and not binding. If, after consultation with counsel, the warden ignored the order and proceeded with the execution, relatively few would support holding the warden in contempt. Many would call for the disciplining of the appellate judge. This illustrates how rarely judgments will be considered legitimate when they are unsupported by jurisdiction.

A final note about formalism and conceptualism: abandoning conceptualism in jurisdictional discourse would not necessarily entail abandoning formalism in that discourse. I take formalism as the belief that judges should decide on the basis of formal rules and not their underlying principles or policies.[84] A formalist generally favors brightline rules over balancing tests. We can still have brightline jurisdictional rules even if we abandon the propositions that jurisdiction equals power and that jurisdiction is conceptually separable from the merits. This is why I am unwilling to say that the Court's holding in *Steel Co.* was incorrect. Perhaps it is best to have a brightline rule to the effect that a federal court must always establish subject matter jurisdiction before it proceeds to anything else. Perhaps such a rule should be absolute, such that it does not matter how difficult the jurisdictional question or how simple the merits question. Perhaps it should not matter how much time or effort could be saved if the court were to reach the merits first. These are all good policy reasons for having a brightline "jurisdiction-first" rule. My only point is that we are not required to have a "jurisdiction-first" rule because of the "nature" of jurisdiction.

84. *See, e.g.*, Larry Alexander, *"With Me, It's All er Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999). I realize there are many other ways of defining formalism. *See* Martin Stone, *Formalism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 162 (Jules Coleman & Scott Shapiro eds., 2002).

Conclusion

History is replete with examples of societies eschewing critical analysis of norms on the ground that "nature" preordains the status quo. Southern whites at one time accepted slavery on the analytically preemptive ground that it was simply in the "nature" of black people to be inferior and subservient. At one time the United States Supreme Court uncritically accepted that women should be kept out of the professional workplace because it was in the "nature" of women to raise and nurture their young children.[85] Although it is somewhat rare for jurisdictional rules to have dramatic social impact, judges should never be spared the hard work of deciding what those rules ought to be. They should have to carefully examine positive law, institutional competences, and social impact before deciding upon those rules. The quality of our legal system can only be diminished when that analysis is short-circuited by a misguided belief, however sincere, about the "nature" of jurisdiction.

85. *See* Bradwell v. Ill., 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

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